

record.^{49/} Damages also are available to compensate a plaintiff for lost business that plaintiff would have had in the absence of an antitrust violation.^{50/}

Antitrust damage remedies are aptly suited to program access violations. The essence of a Section 628 violation is that a cable operator or vertically integrated cable programmer has impeded the complainant's ability to compete by denying the complainant the essential product needed to compete, *i.e.*, programming on nondiscriminatory prices, terms and conditions. The award to a plaintiff of lost profits is, indeed, an "appropriate" remedy.

Procedurally, damages issues should be handled in a manner similar to the procedures recently encouraged in the *Common Carrier Report and Order*. The damages phase of the proceeding should be deferred until after a decision has been rendered on whether a violation of the Commission's rules has occurred.^{51/} Such an approach permits the Commission to focus its scarce resources first on the liability issues and grant prospective relief quickly, and therefore, is in the public interest. If the Commission determines that the defendant has violated Section 628 and the complainant seeks damages, the complainant would file a separate complaint for damages, setting forth the amount sought and the bases therefor. The Commission would be required to render a decision on damages within ninety (90) days following the filing of the damages complaint.

^{49/} *Harkins Amusement Enter. v. General Cinema Corp.*, 748 F. Supp. 1399, 1407-08 (D. Ariz. 1990)(court allowed plaintiff's expert to present loss profit damage models utilizing a combination of various theories)

^{50/} *See Heattransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964 (5th Cir. 1977).

^{51/} *See Common Carrier Report and Order* at ¶ 179.

When competitors are denied access to programming, consumers lose. Adopting rules to impose forfeitures and to permit recovery of damages should fundamentally change the anticompetitive mind set of incumbent cable operators and their programming affiliates who wilfully violate the program access rules without any economic repercussions. To do anything less promotes the status quo where cable incumbents maintain their stranglehold over a captive market to the detriment of viewers all across the country.

VI. THE COMMISSION POSSESSES AUTHORITY TO ADDRESS PROGRAM ACCESS COMPLAINTS INVOLVING TERRESTRIALLY DELIVERED PROGRAMMING WHERE THE COMPLAINANT CAN ESTABLISH THAT TERRESTRIAL DELIVERY WAS FOR THE PURPOSE OF EVADING SECTION 628

Section 628, by its terms, applies only to satellite delivered programming.^{52/} The reason for that limitation is clear and simple: at the time Congress enacted Section 628 in 1992, almost all cable programming was delivered by satellite. There is nothing in the plain language of Section 628 or in its legislative history to suggest any policy reason for limiting the reach of the provision to satellite technology. Congress, quite reasonably, did not contemplate any alternative delivery media. Today, however, it is feasible and perhaps economically desirable, to deliver some types of cable programming via other technologies, including fiber optic cable.

^{52/} Section 628(b) provides:

"It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing *satellite cable programming* or *satellite broadcast programming* to subscribers or consumers." [emphasis added]

A number of media reports and a September 23, 1997 program access complaint filed by DIRECTV against Comcast have raised squarely the question of the Commission's authority to redress program access violations involving terrestrially delivered programming.^{53/} The NPRM expressly seeks comment on this issue.^{54/}

Historically, the Commission has rather strictly construed its authority under Section 628. For example, in 1994, the Commission denied a Petition for Reconsideration of the First Report and Order which sought to make unlawful exclusive contracts for the distribution of programming between DBS operators and vertically integrated satellite cable programming vendors in areas unserved by cable.^{55/} This ruling evidenced the Commission's intent not to extend the reach of Section 628 beyond the statutory boundaries. A strict construction approach, however, does not necessarily mean that the Commission, under current law, is powerless to address any and all program access violations involving terrestrially delivered cable programming. Ameritech believes that if it can be proven that the programming in question is provided terrestrially *for the purpose* of evading Section 628, and the conduct at issue would violate Section 628 were the

^{53/} *Fourth Annual Report* at n.754. (citing complaint of DIRECTV against Comcast filed Sept. 23, 1997). *A New York Times* article observes, Cablevision is busily engaged in building the facilities that will enable it to provide programming via fiber. Thus it will not be subject to the program access rules. See Geraldine Fabrikant, *As Wall Street Groans, A Cable Dynasty Grows*, N. Y. Times, April 27, 1997, financial section at 1 and 8.

^{54/} NPRM at ¶ 51.

^{55/} In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 (Development of Competition and Diversity in Video Programming Distribution and Carriage), (*Memorandum* in MM Docket No. 92-265), FCC Rcd. 3105 (1994).

programming satellite delivered, the Commission's broad powers pursuant to Sections 4 (i) and 303 (r) would enable it to redress such violations.^{56/}

In adopting this position, however, Ameritech recognizes that it may be extremely difficult to prove a purpose of evasion, absent a clear and unlikely admission by the cable operator or program provider. Moreover, there is no policy reason why complainants should be put to such difficult burdens of proof to establish terrestrial program access violations where the conduct (aside from the delivery medium) is clearly actionable. Therefore, Ameritech urges the Commission to recommend to Congress, in light of the changes that have occurred in technology since 1992, that Congress expeditiously enact legislation amending Section 628 to cover *unequivocally* terrestrial-delivered programming. Section 628 should be made technologically neutral. In light of the continually changing state of technology, the changing economics of fiber optic cable and the recent apparent efforts to deliver cable programming terrestrially, Section 628's current limitation to satellite delivered programming may become an increasingly troublesome loophole for bad actors. Sound policy reasons support Congressional action to close the loophole.

VII. CONCLUSION

In light of the problems in the MVPD market persisting despite today's program access rules, the Commission should amend the Commission's rules to strengthen enforcement of

^{56/} Section 4(i) provides: "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."

Section 303 (r) provides that the Commission may: "Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act..."

Section 628 by providing for: (1) a ninety (90) or one hundred fifty (150) day deadline for issuance of decisions on § 628 complaints, depending on whether or not there is discovery; (2) meaningful fact-based pleadings, requiring answers to be supplemented with relevant documents such as contracts, supplemented by discovery as deemed appropriate and necessary by the Commission; and (3) economic penalties in the form of forfeitures and damages awards for Section 628 violations. The Commission has the authority to implement these rules changes. The time to exercise its authority is now when new measures are clearly needed to accelerate the pace of developing competition in the MVPD marketplace.

Respectfully submitted,



Lawrence R. Sidman
Jessica A. Wallace
Julian L. Shepard
Verner, Liipfert, Bernhard.
McPherson & Hand, Chtd.
901 15th Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 371-6000

Counsel for Ameritech
New Media, Inc.

Deborah H. Morris
Ameritech New Media, Inc.
300 South Riverside Plaza
Suite 1800
Chicago, IL 60606
(312) 526-8062

February 2, 1998

**PROPOSED AMENDMENTS TO SUBPART O--
COMPETITIVE ACCESS TO CABLE PROGRAMMING**

Deletions appear as struck-through text
Additions appear as double underlined text

§ 76.1003 Adjudicatory proceedings.

* * *

(b) General pleading requirements.

Program access complaint proceedings are generally resolved on a written record consisting of a complaint, answer and reply, but may also include other written submissions such as briefs ~~and~~ containing proposed findings of fact and conclusions of law, replies to written interrogatories and deposition transcripts. All written submissions, both substantive and procedural, must conform to the following standards:

* * *

(3) Facts must be supported by relevant documentation or ~~affidavit~~ affidavits. Copies of relevant documentation or affidavits that are relied upon in a pleading shall be appended to the pleading.

* * *

(d) Answer.

(1) Any cable operator, satellite cable programming vendor or satellite broadcast programming vendor upon which a program access complaint is served under this section shall answer within ~~thirty (30)~~ twenty (20) days of service of the complaint, unless otherwise directed by the Commission.

* * *

(5) An answer to an exclusivity complaint shall provide the defendant's reasons for refusing to sell the subject programming to the complainant. In addition, the defendant ~~may~~ shall submit to the Commission any exclusive programming contract covering the designated market area ("DMA") specified in the complaint

with its answer to refute allegations concerning the existence of an impermissible exclusive contract or any documents upon which it relies to justify its refusal to deal. If there are no contracts governing the specified area, the defendant shall so certify in its answer. Any contracts submitted pursuant to this provision may be protected as proprietary pursuant to paragraph (h) of this section.

(6)

* * *

(i) When responding to allegations concerning price discrimination, except in cases in which the alleged price differential is de minimis (less than or equal to five cents per subscriber or five percent, whichever is greater), the defendant shall provide attach to the answer a copy of: all contracts between the defendant vertically integrated programmer and all multichannel video programming distributors in the designated market area ("DMA") the complainant serves or reasonably expects to serve; all other documents, such as side letters, affecting prices, terms and conditions; all other documents upon which defendant will rely to justify differences in price, terms, or conditions, including, but not limited to, rate cards; and documentary evidence to support any argument that the magnitude of the differential is not discriminatory.

* * *

(iii) If the defendant believes that the complainant and its competitor are not sufficiently similar, the answer shall set forth the reasons supporting this conclusion, and the defendant ~~may~~ shall submit an alternative contract for comparison with a similarly situated multichannel video programming distributor that uses the same distribution technology as the competitor selected for comparison by the complainant. The answer shall state the defendant's reasons for any differential between the prices, terms and conditions between the complainant and such similarly situated distributor, and shall specify the particular justifications in §76.1002(b) of this subpart relied upon in support of the differential. The defendant shall also provide with its answer written documentary evidence to support its justification of the magnitude of any price differential between the complainant and such similarly situated distributor that is not de minimis.

* * *

(8) In an answer to any program access complaint, a defendant shall append to its answer all documents upon which it intends to rely to establish its defense.

- (e) Reply. If neither side seeks discovery pursuant to paragraph (g)(1) of this section, ~~within(c) Reply.~~ Within twenty (20) days after the service of an answer, the complainant may file and serve a reply which shall be responsive to matters contained in the answer and shall not contain new matters. Failure to reply will not be deemed an admission of any allegations contained in the answer except with respect to any affirmative defenses set forth therein. Replies containing ~~in the answer,~~ information claimed by the defendant to be proprietary under paragraph (h) of this section shall be submitted to the Commission in confidence pursuant to the requirements of § 0.459 of this chapter and clearly marked "Not for Public Inspection." An edited version removing all proprietary data shall be filed with the Commission for inclusion in the public file within five (5) days from the date the unedited reply is submitted, and shall be served on the defendant.

* * *

- (g) Discovery.
- (1) Within five (5) days of the service of the answer, the parties shall advise each other and the Commission in writing of whether they intend to request discovery. If either party requests discovery, there shall be a presumption in favor of discovery by the Commission staff. The Commission staff ~~may,~~ in its discretion, may order discovery limited to the issued issues specified by the Commission. Such discovery may include depositions, answers to written interrogatories or document production.
- (2) ~~The Commission staff may in its discretion direct the parties to submit discovery proposals, together with a memorandum in support of the discovery requested. Such discovery requests may include answers to written interrogatories, document production or depositions. The Commission staff will then~~ If a party requests discovery, the Commission staff will hold a status conference with the parties, pursuant to paragraph (j) of this section, to decide the request and determine the scope of discovery ~~and schedule for discovery. Discovery shall conclude within forty-five (45) days of the status conference.~~ If the Commission staff determines that extensive discovery is required or that depositions are warranted, the staff will advise the parties that the proceeding will be referred to an administrative law judge in accordance with paragraph (m) of this section.

* * *

(i) Other required written submissions. In cases where discovery is conducted:

(1) If possible, the parties shall submit a joint stipulation of facts not in dispute within fifteen (15) days following completion of discovery.

(2) The parties shall concurrently submit briefs containing proposed~~(1) The Commission may, in its discretion, require the parties to file briefs summarizing the facts and issues presented in the pleadings and other record evidence. Those briefs shall contain the findings of fact and conclusions of law which that party is urging the Commission to adopt, with specific citations to the record, and supported by relevant authority and analysis, within fifteen (15) days following completion of discovery.~~

~~(2) The Commission may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceeding, including copies of all contracts and documents reflecting arrangements and understandings alleged to violate the program access requirements set forth in the Communications Act and §§ 76.1001 and 76.1002 of this subpart, as well as affidavits and exhibits.~~

~~(3) Any briefs submitted shall be filed concurrently by both the complainant and defendant at such time as is designated by the staff. Such briefs shall not exceed fifty (50) pages.~~

(3) All evidentiary exhibits which the parties seek to include in the record shall be filed with the Commission and served on the opposing party contemporaneously with the filing of briefs containing proposed findings of fact and conclusions of law.

(4) Parties shall be permitted to file reply briefs within seven (7) days of the service of the briefs containing proposed findings of fact and conclusions of law. At such time the record shall be deemed closed~~(4) Reply briefs may be submitted by either party within twenty (20) days from the date initial briefs are due. Reply briefs shall not exceed thirty (30) pages.~~

(5) Briefs containing information which is claimed by an opposing party or third party to be proprietary under paragraph (h) of this section shall be submitted to the Commission in confidence pursuant to the requirements of § 0.459 of this chapter, and shall be clearly marked "Not for Public Inspection." An edited version removing all proprietary data shall be filed with the Commission for inclusion in the public file within five (5) days from the date the unedited version is submitted and served on opposing parties.

(6) The Commission may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the

proceeding, including copies of all contracts and documents reflecting arrangements and understandings alleged to violate the program access requirements set forth in the Communications Act and §§ 76.1001 and 76.1002 of this subpart, as well as affidavits and exhibits.

(j) Status conference.

(1) In any program access complaint proceeding in which discovery is ordered pursuant to paragraph (g)(1) of this section, the Commission Staff ~~may its discretion~~ shall direct the attorneys and/or the parties to appear for a conference to consider:

* * *

(v) The schedule for and extent of discovery, including interrogatories, depositions or requests for written documents;

(2) Unless otherwise ordered by the Commission, an initial status conference shall take place within ten (10) days after the service of the answer.

(3) Conferences may be conducted in person or by telephone conference call.

* * *

(k) Commission Decision.

(1) The Commission staff shall render a decision within ninety (90) days from the filing of the complaint in cases where there is not discovery and within one-hundred and fifty (150) days from the filing of the complaint in cases where there is discovery.

(l)(~~k~~) Specifications as to pleadings, briefs, and other documents; subscriptions.

(~~h~~)(m) Copies; service.

(~~m~~)(n) Referral to administrative law judge.

(~~n~~)(o) Petitions for reconsideration.

~~(o)~~(p) Interlocutory review.

~~(p)~~(q) Expedited review.

~~(q)~~(r) Frivolous complaints.

~~(r)~~(s) Statute of limitations.

~~(s)~~(t) Remedies for Violations.

* * *

~~(2)~~(2) Fines. In addition to the remedies provided in paragraph (1) of this section, in any proceeding under this section in which the defendant is found to have violated Section 628 of the Communications Act of 1934, defendant shall be liable for payment of a fine in the amount of \$7,500 for each day of the violation. Such violations shall be deemed to be continuing violations. In the case of refusals to deal, the fines shall be calculated commencing from the date on which the defendant first refused to provide programming in response to plaintiff's written request for such programming. In the case of price discrimination, the fines shall be calculated commencing from the date of the contract between plaintiff and defendant containing unlawfully discriminatory prices, terms or conditions.

(3) Damages. A complainant injured by a defendant's conduct found to have violated Section 628 may seek damages from the defendant as compensation for the harm suffered. A complaint for damages shall be deferred until after a defendant's liability for a violation of Section 628 has been determined. Complaints for damages shall be resolved within ninety (90) days from the filing of the damages complaint.

(4) Additional sanctions. The remedies provided in paragraph (s)(1) and (2) and (3) of this section are in addition to and not in lieu of the sanctions available under title V or any other provision of the Communications Act.

Examples of Competitive Response To Ameritech Market Entry

Competitor	Before Ameritech New Media's Entry	After Ameritech New Media's Entry	Adjacent Non-Competitive Community Served by Incumbant
Time Warner	Wayne, MI Expanded Basic \$23.95 Disney \$11.45 Regional Sports \$13.95 Premiums \$12.95 <u>Converter/remote \$3.37</u> Total Package \$65.67	Wayne, MI Added 17 channels Expanded Basic \$22.81 (incl. Disney & Regional Sports) Premiums \$9.95 <u>Converter/remote \$2.95</u> Total Package \$35.71	Farmington, MI Nearly Identical Lineup Expanded Basic \$29.02 (incl. Regional Sports) Disney \$8.95 Premiums \$8.95 <u>Converter/remote \$2.40</u> Total Package \$49.32
Cablevision	Berea/North Olmsted, OH Expanded Basic \$19.63 Disney \$10.45 <u>Premiums \$10.45</u> Total Package \$40.53 Tyson/Holyfield fight \$49.95	Berea/North Olmsted, OH Added 20 channels Expanded Basic \$21.95 (incl. Disney) <u>Premiums \$9.95</u> Total Package \$31.90 Tyson/Holyfield fight Free	Strongsville, OH 18 less channels Expanded Basic \$23.44 Disney \$10.45 <u>Premiums \$9.95</u> Total Package \$43.84 Tyson/Holyfield fight \$49.95
Media One	Canton, Plymouth, MI Expanded Basic \$21.79 Disney \$9.69 Regional Sports \$11.95 <u>Premiums \$9.69</u> Total Package \$53.12	Canton, Plymouth, MI Added 20 channels Expanded Basic \$22.95 (incl. Disney & Regional Sports) <u>Premiums \$9.69</u> Total Package \$32.64	Ann Arbor, MI Nearly identical lineup Expanded Basic \$26.75 (incl. Disney & Regional Sports) <u>Premiums \$9.69</u> Total Package \$36.44

Before = Prior to the competitive response to Ameritech New Media's launch

After = There is a competitive response either immediately before Ameritech New Media's launch in a market or a few months following.

Examples of Competitive Response To Ameritech Market Entry

Competitor	Before Ameritech New Media's Entry	After Ameritech New Media's Entry	Adjacent Non-Competitive Community Served by Incumbant
TCI	Royal Oak, MI Expanded Basic \$32.23 Equip \$3.30 Disney \$10.45 Regional Sports \$12.95 <u>Premiums \$14.95</u> T²total Package \$73.88	Royal Oak, MI Expanded Basic \$28.95 1st Equip Free Indefinitely (Incl. Disney and Regional Sports) <u>Premiums \$10.45</u> Total Package \$39.40	Rochester, MI Identical Lineup Expanded Basic \$32.23 Equip \$3.30 (Incl. Disney and Regional Sports) <u>Premiums \$10.45</u> Total Package \$45.98
TCI	Lincoln Park, MI Expanded Basic \$25.32 Equip \$3.30 Disney \$10.90 Regional Sports \$10.90 <u>Premiums \$14.95</u> Total Package \$65.37	Lincoln Park, MI Added 13 channels Expanded Basic \$23.95 1st Equip Free Indefinitely (Incl. Disney and Regional Sports) <u>Premiums \$10.45</u> Total Package \$34.40	Gibraltar, MI Nearly identical lineup Expanded Basic \$26.01 Equip \$3.30 (Incl. Disney and Regional Sport) <u>Premiums \$10.45</u> Total Package \$39.76
Comcast	Southgate, MI Expanded Basic \$24.05 Disney \$12.95 Regional Sports \$12.95 <u>Premiums \$11.95</u> Total Package \$61.90	Southgate, MI Added 16 channels Expanded Basic \$23.95 (Incl. Disney and Regional Sports) <u>Premiums \$12.95</u> Total Package \$36.90	Grosse Isle, MI Nearly identical Lineup Expanded Basic \$27.06 (Incl. Regional Sports) Disney \$ 7.95 <u>Premiums \$12.95</u> Total Package \$47.96

➤ **Before** = Prior to the competitive response to Ameritech New Media's launch

After = There is a competitive response either immediately before Ameritech New Media's launch in a market or a few months following.

Examples of Competitive Response To Ameritech Market Entry

Competitor	Before Ameritech New Media's Entry	After Ameritech New Media's Entry	Adjacent Non-Competitive Community Served by Incumbant
Comcast	<p>Melvindale, MI</p> <p>Expanded Basic \$25.95</p> <p><u>Disney \$12.95</u></p> <p>Total Package \$38.90</p> <p>Starter Pack - Expanded Basic, Equip, HBO,2,3, Encore for \$43.95</p>	<p>Melvindale, MI</p> <p>Added 31 Channels</p> <p>Expanded Basic \$25.95</p> <p><u>(incl. Disney)</u></p> <p>Total Package \$25.95</p> <p>Starter Pack - Expanded Basic, Equip, HBO,2,3, Encore for \$29.95</p>	<p>Harper Woods, MI</p> <p>Nearly Identical Lineup</p> <p>Expanded Basic \$27.95</p> <p><u>Disney \$12.95</u></p> <p>Total Package \$40.90</p> <p>Starter Pack - Expanded Basic, Equip, HBO,2,3, Encore for \$39.95</p>
Coaxial	<p>Columbus, OH</p> <p>Expanded Basic \$29.61</p> <p>Disney \$6.95</p> <p><u>TCM \$11.95</u></p> <p>Total Package \$48.51</p>	<p>Columbus, OH</p> <p>Added 9 channels</p> <p>Expanded Basic \$26.40</p> <p><u>(incl. Disney & TCM)</u></p> <p>Total Package \$26.40</p>	<p>Whitehall*, OH</p> <p>Identical Lineup</p> <p><u>Expanded Basic \$26.40</u></p> <p><u>(incl. Disney & TCM)</u></p> <p>Total Package \$26.40</p> <p>*ANM is near completion of franchising discussions with Whitehall.</p>

Before = Prior to the competitive response to Ameritech New Media's launch

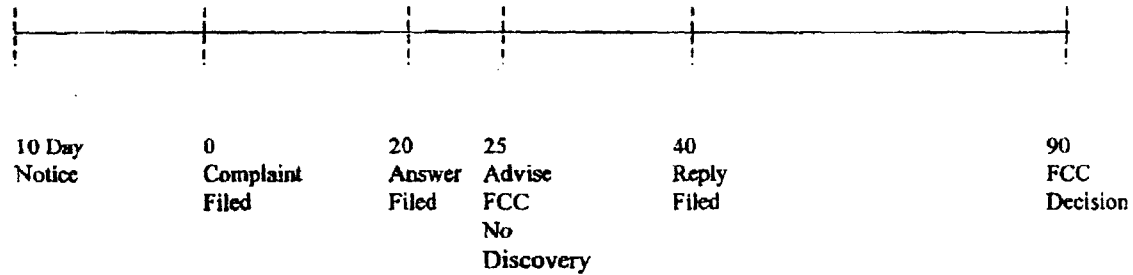
After = There is a competitive response either immediately before Ameritech New Media's launch in a market or a few months following.

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APPENDIX 3

**PROPOSED TIMELINE AND KEY EVENTS IN PROGRAM ACCESS
COMPLAINT RESOLUTION PROCESS**

**No Discovery
(90 Days)**



**Discovery
(150 Days)**

